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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

In Re:	)	Case No. 03-21652
	)	
GERALD & ONA LINDSEY,	)	MEMORANDUM IN SUPPORT
	)	OF TRUSTEE'S SECOND MOTION
Debtors	)	TO AMEND THE PETITION
	)	
	)	

COMES NOW Ford Elsaesser, the Chapter 7 Trustee, by and through his attorney of record, Barry McHugh of ELSAESSER JARZABEK ANDERSON MARKS ELLIOTT & MCHUGH, CHTD., and files this Memorandum In Support of Trustee's Second Motion to Amend the Petition pursuant to 11 U.S.C. §§ 521 and 541.

1. **Statement of Facts**

This case involves a scheme over ten years in duration by the Debtors to try to protect their assets for their children. When the conclusory statements are disregarded, the facts are clear that Mountain Property Management and Trust Company, the National Holding Trust, and Equitable Financial Services are merely an alter egos of the Debtors and do not achieve the objectives sought.

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On October 15, 2003, Debtors Gerald and Ona Lindsey (hereinafter "Debtors") filed a Voluntary Petition, seeking relief under Chapter 13 of the Bankruptcy Code. After creditors objected to the Chapter 13, and the Chapter 13 Trustee, C. Barry Zimmerman, filed a motion to convert the case from Chapter 13 to Chapter 7, the case converted to Chapter 7 pursuant to the Voluntary Conversion filed by Debtors on January 15, 2004.

The bankruptcy schedules filed by Debtors indicate total assets of $42,000.00, including real property of $40,000.00 and personal property of $2,000.00. The schedules list unsecured priority claims of $3,460,961.59 and unsecured nonpriority claims of $302,094.28, for a total of 3,763,055.87. The Statement of Financial Affairs filed by Debtors indicates that they have no income from employment or operation of a business (paragraph 1), and hold no property for another person (paragraph 14). Further, in paragraph 18, Debtors list a number of businesses in which Debtors were involved, but none of which were in operation after January 2001. Much of this information appears to be inconsistent with evidence presented at the 341 Hearing conducted on March 1, 2004 and March 15, 2004, and which is not concluded at this time because of a refusal by Gerald Lindsey to answer questions by counsel for the Trustee relating to a $660,000.00 cash withdrawal in 2000. See Affidavit of Barry McHugh in Support of Second Motion to Amend the Petition and Motion for Turnover of Property (hereinafter "Affidavit of Barry McHugh"), ¶ 5.

The 341 Hearing relating to both Debtors began on March 1, 2004, at 10:00 a.m. and lasted the remainder of the day. It was adjourned without being completed, and ultimately rescheduled for March 15, 2004. On March 8, 2004, pursuant to a stipulation by Debtors and their counsel, counsel for the Trustee conducted an inspection and video and photographic inventory of property at the residence in which Debtors live. The residence is located on

approximately 270 acres which is situated on the west side of the Salmon River just south of White Bird, Idaho, and almost directly across the river from Hoot's Cafe, which is immediately adjacent to Idaho Highway 95. The hearing continued on March 15 and began at 10:00 a.m. and concluded approximately 3:00 p.m., at which time it was discontinued, but not concluded.

During the course of questioning by counsel for the Trustee, Mr. Lindsey was asked about a $660,000.00 cash withdrawal he made in 2000. Mr. Lindsey testified that the money was withdrawn from an account and was loaned to an individual. Mr. Lindsey testified that the loan was ultimately determined by him to be uncollectible and no longer an asset. Upon questioning, Mr. Lindsey refused to identify the name of the individual to whom the money was loaned, refused to reveal the terms of the loan, and suffered a suspicious lack of memory with regards to who was involved in the withdrawal of the funds besides himself. Ultimately, Mr. Lindsey testified that because the disclosure of the identity of the person to whom he had loaned the money would violate a "trust relationship", Mr. Lindsey testified that he would go to jail before he would reveal the identity of the person to whom the money was loaned. This declaration was made despite a lengthy explanation regarding why it was relevant and important for the Trustee to have all information in order that the Trustee could evaluate the transaction and determine whether or not an asset of the estate continued to be in existence.

The residence was designed by Mrs. Lindsey, and built over a number of years with money and/or proceeds from property Debtors purportedly transferred to the Searchlight Trust. The Searchlight Trust was established in 1994, allegedly for estate planning purposes. Debtors received nothing for the transfer of virtually all of their real and personal property, which included thousands of acres of property. Mr. Lindsey asserts Debtors entered into an oral agreement that would allow them to build and furnish their current residence with Searchlight

Trust funds, that they could live there until death, that the Searchlight Trust would purchase and maintain vehicles for Debtors, and that the Searchlight Trust would pay their insurance, medical, and other living expenses until death. The money to pay the current taxes on the property comes from the sale of the real property. See Exhibits 3 and 1 to Affidavit of Barry McHugh, citing pp. 10-11, 15-16, 48, 77-78, 113, 130-131, 214-219, and 246-247 of the examination transcript.

The residence is approximately 9,000 square feet and cost approximately $1 million to build. Although Debtors testified that they had designed the house to be a bed and breakfast, only Debtors have lived in the residence and it has never served as a bed and breakfast. The furniture, fixtures, and decorations were selected and purchased by Debtors with Searchlight Trust money. See Exhibit 1 to Affidavit of Barry McHugh, citing pp. 188-190 and 197 of the examination transcript.

The Searchlight Trust has paid the Debtors' utilities, insurance, groceries, and other living expenses since 1994. Until 2001, when Debtors received a letter from the Internal Revenue Service, Gerald Lindsey served as the caretaker/manager of the trust property. Trustees of the Searchlight Trust, Boyd Hopkins and James Spickelmire, testified that while they were trustees, they mere figureheads and merely acted in that role as a favor to Gerald Lindsey. Boyd Hopkins testified that he merely followed the lead of Gerald Lindsey, Shannon Lindsey (Lindsey's son), or Julie Fowler. See Objection to Chapter 13 Plan and Joinder of Trustee's Motion to Convert Case (hereinafter "Vial Objection") filed by Sheila R. Schwager on December 30, 2003, which is incorporated herein by reference, as well as the supporting documents, and Exhibit 1 to Affidavit of Barry McHugh, citing pp. 250-252 of the examination transcript. Julie Fowler testified that prior to the transfer of authority to Mike Ioane, she took her directions regarding the Searchlight Trust from Gerald Lindsey. Vial Objection at paragraph 13. Mr.

Lindsey testified that "he" sold off all the real property except for 270 acres. See Exhibit 1 to Affidavit of Barry McHugh, citing pp. 29-30 of the examination transcript.

On the real property are numerous pieces of farming equipment and other types of equipment, owned by the Trust. Also on the property is equipment represented to be owned by Ray and Maryann Holes, who are Debtors' daughter and son-in-law, and a few pieces of property owned by Julie Fowler and Boyd Hopkins, who also live in a residence on the property. Lastly, it has been represented that a renter who lives on the property has a few items of personal property. However, much of the equipment appears to be owned by the Searchlight Trust. See Exhibit 4 to the Affidavit of Barry McHugh.

Gerald Lindsey testified at the 341 Hearing that he decided to make Mike Ioane the administrator of the Searchlight Trust in 2001 after receiving an assessment letter from the Internal Revenue Service. Mr. Lindsey testified that he knew nothing of Mr. Ioane, but made the decision based on the recommendation of individuals at First American Publishers. Mr. Lindsey has met Mr. Ioane once in person. He testified that he has been unable to contact Mr. Ioane and that he has no idea whether the estate planning purpose of the Searchlight Trust will be achieved by Mr. Ioane's administration of the Searchlight Trust and that he is concerned about what might happen to the assets that were transferred to that trust. Significantly, there is no mention of an "administrator" position within the document establishing the Searchlight Trust. See Exhibits 3 and 1 to Affidavit of Barry McHugh, citing pp. 23-24, 269-273, and 282-285 of the examination transcript.

Mr. Lindsey does not know the identities of the current trustees of the Searchlight Trust, or if they exist. Mr. Lindsey believes that Mr. Ioane has all records regarding the Searchlight Trust. See Exhibit 1 to Affidavit of Barry McHugh, citing pp. 10-11, 93-94, and 124 of the

examination transcript. Further, he testified that he has no knowledge of the National Holding Trust, which holds title to the vehicles that he and Mrs. Lindsey drive, Mountain Property Management and Trust Company, which holds title to real estate formerly owned by Debtors and LT&L, Inc., or Equitable Financial Services. He testified that he does not know why these entities were established and does not know who controls them, though he considers Mountain Property Management and Trust Company to be another name for the Searchlight Trust. See Exhibits 2, 5 and 1 to Affidavit of Barry McHugh, citing pp. 59-63, 79, 133-136, 179-182, and 290-291 of the examination transcript. Mr. Lindsey asserts this lack of knowledge despite his activity as an agent for National Holding Trust in 2003 in Alaska, where Mr. Lindsey was involved in mining assessment work. Mr. Lindsey during 2003 had signatory authority over a National Holding Trust checking account. See Exhibit 1 to Affidavit of Barry McHugh, citing pp. 136, 169-170, 171-175, and 221-222 of the examination transcript.

2. Statement of the Law

a. Duty to Assist Trustee

It should be noted initially that Debtors have provided no documentation for the Trustee to review regarding the validity of the named entities. Their testimony is that they divested themselves of all documents related to the Searchlight Trust, and they have made no apparent effort to obtain those documents for the Trustee's review. Debtors are required to surrender to the Trustee all property of the estate and any recorded information, including books, documents, records, and papers relating to property of the estate. *See* 11 U.S.C. § 521(4) and 542(a). All records used during the §341 examination and submitted for the Court's review were either provided by the Trustee or creditors' counsel.

Federal Rule of Bankruptcy Procedure 4002 further requires the Debtors to "cooperate with the [t]rustee in ... the administration of the estate." Fed. R. Bankr. P. 4002(4). In addition to imposing affirmative duties on the Debtors, these provisions impress the policy that a debtor who voluntarily submits him or herself to the jurisdiction of the Bankruptcy Court to obtain the benefit of a discharge of debts, must fulfill certain duties to ensure that estate assets are administered in accordance with applicable law. *In Re Farmer*, 237 B.R. 210, 212 (Bankr.N.D. Fla. 1999); *In Re McDonald*, 25 B.R. 186, 189 (Bankr.N.D. Ohio, 1982). The Court in *McDonald* stated that it is essential for debtors to assist the trustees since the trustees have large case loads and get paid very little to administer the cases. *Id.* If a debtor refuses to meet this burden, the court may refuse to grant the debtor the benefit of a discharge. *Id.* at 189.

The Trustee asserts that the named entities are in fact sham trusts based on the evidence that Gerald and Ona Lindsey, from the time the Searchlight Trust was created in 1994, had complete authority and control over the disposition of assets placed into the Searchlight Trust, and exercised control over the directors of the Searchlight Trust until 2000. In 2000 Mr. Lindsey made the decision to have Mike Ioane appointed as "administrator" of the Searchlight Trust as the result of threatened Internal Revenue Service action, yet Debtors continue to enjoy the benefits of the assets of the named entities while asserting that they have no knowledge regarding the qualifications, activities, decision making, or ultimate disposition of the property originally in the Searchlight Trust which have been transferred to the named entities. More significant is the lack of such an "administrator" position within the document establishing the Searchlight Trust.

The questionable nature of these entities makes it imperative that the Trustee have all documents available for examination. Because Debtors have failed to cooperate in obtaining

those documents, this motion is an appropriate vehicle to allow the Trustee to seek documents from third parties.

b. The Nominee Theory

The Nominee Theory stems from equitable principles, and was first used in tax cases. This theory focuses on the relationship between the debtor and the property in question, and attempts to determine whether the debtor engaged in a sort of legal fiction. The goal is to determine whether the debtor placed legal title to property in the hands of another, while in actuality, retaining all or some of the benefits of being a true owner. *In Re Richards,* 231 B.R. 571, 578 (E.D. Pa. 1999). "Said another way, the Nominee Theory is utilized to determine whether property should be construed as belonging to the [debtor] if he/she treated and viewed the property as his/her own, in spite of the legal machination employed to distinguish legal title to the property." The factor relevant to the Nominee Theory determination include:

(1) No consideration or inadequate consideration paid by the nominee;

(2) property placed in the name of the nominee in anticipation of a suit or occurrence of liabilities while transferor continues to exercise control over the property;

(3) close relationship between transferor and the nominee;

(4) failure to record conveyance;

(5) retention of possession by the transferor;

(6) continued enjoyment by the transferor of the benefits of the transferred property; and

(7) expenditure of personal funds by the transferor to purchase and maintain the property.

Id. at 579. However these factors should not be applied rigidly or mechanically, as no one factor is determinative. Rather, the critical consideration is whether the debtors exercised active or

substantial control over the property. *Id., citing United States v. Kudasik*, 21 F. Supp. 2nd 501, 508 (W.D. Pa. 1998).

The facts here are similar to those in *In Re Richards*, where it was determined that the evidence was sufficient to find that the nominee theory justified bringing the questioned property into the bankruptcy estate. Searchlight Trust provided no consideration to Debtors for the property transferred to it. Further, Debtors continued to exercise control over their property. While the initial trustees were not acquaintances of Debtors, they were quickly replaced with trustees who were friends of Debtors, James Spickelmire and Boyd Hopkins. Boyd Hopkins has lived on the property with Julie Fowler for a number of years. James Spickelmire is a long-time friend of Gerald Lindsey. Both Hopkins and Spickelmire testified that they made no significant effort in any aspect of their role as trustee, and simply did as instructed by Gerald Lindsey.

While the conveyance of Debtors' property was recorded, they continued to be in possession and control of all of their property. They also continued to enjoy the benefits of the transferred property, even to the extent of building their dream home at a cost in excess of $1 million, and continuing to purchase vehicles for their use.

Further, Debtors had their living expenses, insurance and utilities paid by the trusts since 1994. Lastly, the property was purchased with the personal funds of Debtors, or by their corporation LT&L, Inc., and virtually all of their personal property and assets were transferred into Searchlight Trust, which assets were then used to maintain the property since 1994.

The goals of the Searchlight Trust and the named entities, were to leave the Debtors in possession and control of their real and personal property, while protecting substantially everything from potential creditors. That became obvious when Gerald Lindsey decided to appoint Mike Ioane, someone he did not even know, and someone whose professional

credentials were not made available to Mr. Lindsey, to be the "administrator" of the trust. Since that time, Debtors testified that all documentation regarding the Searchlight Trust has been transferred to Mr. Ioane, making it impossible to examine the legitimacy of the named entities. Further, the named entities have been created, with the ironic result according to Mr. Lindsey, that he has no knowledge regarding how the assets are being administered, no knowledge regarding whether the assets will ultimately pass to Debtors' heirs as intended when they established the Searchlight Trust, no knowledge regarding the control and management of the trusts which own the property that they placed into the Searchlight Trust, and no way to easily contact Mike Ioane. Obviously, Debtors went from one extreme, where they had complete control over the assets in the Searchlight Trust, to a situation where they have no knowledge and no control, as a way to shield the assets from the Internal Revenue Service. Both scenarios point to a situation which has no basis in fact or in law, and these trusts should be included in the bankruptcy estate, as should all of the assets.

c. Sham Trust

If a trust is a sham, and essentially the alter egos of the debtors, the trust must be disregarded for purposes of a bankruptcy case. In such a case the trusts, and all of their assets, become the property of the estate. *In Re Gillespie,* 269 B.R. 383, 388 (E.D. Ark. 2001).

> In determining whether an entity is an individual's alter ego, the courts apply a totality of the circumstances task, looking to:
>
> * Whether there is respect for the corporate or entity formalities;
>
> * whether there is commingling of entity and personal funds and expenses, including a use of the entity's assets for personal purposes; and
>
> * the family relationships between the officers/trustees and the individual.

Id. at 388-389, *citing United States v. Horton Dairy, Inc.*, 986 F.2d 286, 289 (8th Cir. 1993). In *Gillespie*, the bankruptcy court for the Eastern District of Arkansas set aside a trust and authorized the Trustee to take the property under §541.

"When the form of the transaction has not, in fact, alternated any cognizable economic relationships, we will look through that form and apply the tax according to the substance of the transaction." *Markosian v. Commissioner,* 73 T.C. 1235 (1980), *citing Verman v. Commissioner*, 45 T.C. 360 (1966), *affd. per curiam* 381 F.2d 22 (5th Cir. 1967). In *Markosian* a trust was set aside based upon the following:

(a) Even though the trust was validly established, the terms of the trust and supporting documents were not adhered to;

(b) a lack of recognition by the trustees of any fiduciary responsibilities in dealing with the trust's assets (i.e. rent-free use of real property, no evaluation of reasonable management fee, no effort to collect 100% of income).

Markosian, at 1242-1243. Further, it was held that there was no economic realty or substance to the transaction which purportedly transferred property owned by trustees to the trust. First, the relationship of the grantors to the property transferred did not differ in any material aspect before and after the creation of the trust. Second, trustees, as equal grantors, were also co-trustees with no person independent of their wishes and power to prevent them from acting in derogation of the interests of the other beneficiaries. Third, there was no perceivable economic interest which passed to other beneficiaries under the trust arrangement. Fourth, trustees did not feel bound by any restrictions opposed by the trust or the law of trusts. *Id.* at 1243-1245.

There is no economic realty or substance to the property transfers and the continuing operation and maintenance of the Debtors' property. The relationship of Debtors to their property did not change until the Internal Revenue Service wrote Debtors, at which time they

made a dramatic change. And although Debtors claim that the Searchlight Trust was established as an estate planning tool, they have no information regarding the passing of any interest in their property to their heirs. Significantly, Debtors have divested themselves of all records regarding the Searchlight Trust in an obvious attempt to prevent the Trustee or any creditors from examining and evaluating the validity of the named entities. In such a circumstance, where there is abundant evidence that Debtors continued to treat the property as if it was theirs, and attempted to separate themselves from management of the trust only when the Internal Revenue Service made a claim against them, and have intentionally prevented anyone with an interest from seeing documents to evaluate the validity of trust, it is incumbent upon the Court to bring these assets into the estate in order to satisfy debts owed by Debtors to the extent possible.

The named entities are the alter egos of Debtors, though they deny it. As such, the Trustee and the creditors can reach the assets of these entities. The entities are managed and operated in a fashion which indicates that they are in fact a sole proprietorship, though Gerald Lindsey has attempted to divest himself of the control. However, his efforts went so far in the other direction, that they do not pass a reasonableness test. Therefore, the assets of the trusts are within reach of the Trustee. *Vaughn v. Sexton,* 970 F.2d 498, 504 (8th Cir. 1992), *cert. denied* 507 US 915 (1993).

CONCLUSION

The named entities are in ownership of property or interests in property transferred by Debtors to the Searchlight Trust in or after 1994. The named entities are being used to improperly avoid creditors. Debtors lack of knowledge regarding these entities supports the conclusion that they are sham trusts and all their assets should be included in the bankruptcy

estate. Further, this order will further the Trustee's efforts to fulfill his duties. Therefore, the Trustee's motion should be granted.

DATED this 23rd day of March, 2004.

ELSAESSER JARZABEK ANDERSON
MARKS ELLIOTT & MCHUGH, CHTD.

Barry McHugh
Attorney for Chapter 7 Trustee

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 2004, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF TRUSTEE'S SECOND MOTION TO AMEND PETITION was served upon the following via U.S. Mail, first class, postage prepaid.

Ford Elsaesser Chapter 7 Trustee P.O. Box 2220 Sandpoint, ID 83864	U.S. Trustee 304 N. 8th Street, Rm 347 Boise, ID 83702
Brit D. Groom Attorney at Law P.O. Box 218 Grangeville, ID 83530	Warren Derbidge US Attorney's Office 877 w. Main, Ste. 201 Boise, ID 83702
Sheila R. Schwager Hawley Troxell P.O. Box 1617 Boise, ID 83701-1617	Gerald & Ona Lindsey HC01 Box 109A White Bird, ID 83554
Mountain Property Management and Trust Company HC01 Box 109B White Bird, ID 83554	National Holding Trust HC01 Box 109B White Bird, ID 83554
Equitable Financial Services HC01 Box 109B White Bird, ID 83554	

Barry McHugh